

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:OHI:CIN:TL-N-5311-00

JEKagy

date:

to: Chief, Appeals Division, Ohio District
Attn: Rick O'Connor

from: Assistant District Counsel, Ohio District, Cincinnati

subject:

██████████
Claim for Refund

DISCLOSURE STATEMENT

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This memorandum responds to an oral inquiry made by Appeals Officer Rick O'Connor on September 11, 2000 regarding the matter referenced above. A year earlier, on September 28, 1999, the taxpayer submitted a letter seeking the payment of interest on a ██████████ deposit made by the taxpayer regarding its ██████████ and ██████████ tax liability. The taxpayer's letter has been treated by Appeals as an informal claim for refund. The taxpayer's deposit has already been returned to the taxpayer, but without the payment of any interest. This nonpayment of interest was based upon the Service's conclusion that the deposit was a payment in the nature of a cash bond, not an advance payment of tax.

In his preparation of a response to the taxpayer's informal claim for refund, Mr. O'Connor found that, according to Rev. Proc. 84-58 and other authorities, deposits in the nature of cash bonds are not subject to a claim for credit or refund and that *the excess of the deposit over the liability ultimately determined to be due will not bear interest under section 6511.* Because deposits in the nature of cash bonds are not subject to a claim for credit or refund, Mr. O'Connor was hesitant to issue a claim disallowance to the instant taxpayer, fearing that such a disallowance letter might be interpreted as an admission by the Service that the deposit was, in fact, an advance payment of tax, not a cash bond. His thinking was that since a cash bond is not subject to a claim for refund, disallowance letters, which address claims for credits or refunds, must apply only to advance payments of tax. In other words, Mr. O'Connor wondered whether a response by the Service to a claim involving a cash bond should not utilize the same disallowance form letter (Form 1364) as is used for responses to claims involving advance payments of tax.

ISSUE:

Whether the Service's use of a Form 1364 to deny a claim for refund or credit associated with a deposit in the nature of a cash bond compromises the Service's position that the remittance was, in fact, a deposit in the nature of a cash bond.

CONCLUSION:

We believe that the use of Form 1364 is appropriate for the denial of a claim regardless of whether the payment in question is considered an advance payment of tax or payment in the nature of a cash bond. We view the use of Form 1364 as irrelevant to the determination of the real matter at issue, namely whether the deposit was an advance payment of tax or a deposit in the nature of a cash bond.

FACTS:

On [REDACTED], after the commencement of the Service's audit of [REDACTED] ("[REDACTED]") returns for the [REDACTED] and [REDACTED] tax years, [REDACTED] submitted a \$[REDACTED] remittance to the Service. Accompanying the remittance was a letter of even date which contained the following:

As we have previously discussed, the [REDACTED] [REDACTED] [sic] desire to prepay and thereby stop the interest accumulation on the [REDACTED]-[REDACTED] adjustments anticipated as a result of our previous settlement with the Internal Revenue Service, which

changed our publishing affiliates' method of reporting from the cash method to the accrual method as of [REDACTED].

The accompanying letter, which did not contain instructions that the payment was to be treated as a cash bond as had the taxpayer's earlier years' letters, also provided the following instructions for the application of the funds:

	[REDACTED]	[REDACTED]	<u>TOTAL</u>
Tax Adjustment	\$ [REDACTED]	\$ [REDACTED]	\$ [REDACTED]
Interest Thereon	[REDACTED]	[REDACTED]	[REDACTED]
	<u>\$ [REDACTED]</u>	<u>\$ [REDACTED]</u>	<u>\$ [REDACTED]</u>

The Payment Posting Vouchers prepared regarding the remittance denominated the payment as a "cash bond" and allocated the remittance between the tax years. In the "REMARKS" section, each of the Vouchers carried a typewritten notation specifying that the amount applied to each tax year should be allocated between tax and interest in a manner consistent with the taxpayer's instructions.

According to the [REDACTED], an official from the taxpayer's tax department who was present during the generation of the Vouchers, the reason the allocation between tax and interest was typed on the Vouchers was to show the taxpayer's intent that the remittance be treated as an advance payment of tax and because the "cash bond" box had been checked. But see IRM 4485.2(7)(g) (upon acceptance of an advance payment whether before or after a deficiency has been determined, in filling out a Form 3244-A, Payment Posting Voucher, the REMARKS section should contain "the amount of payment allocated for tax and interest as well as any special instructions" ... and "Cash Bond" should be checked "only for ADVANCED PAYMENTS ACCEPTED BEFORE THE DEFICIENCY CAN BE DETERMINED.")

The Service's audit of [REDACTED] and [REDACTED] tax returns commenced on [REDACTED] although the [REDACTED] tax year reflected an NOL of approximately \$ [REDACTED]. Regardless, a Form 5701 relating to the cash to accrual method issue was not issued until [REDACTED] and was superseded by a Form 5701 dated [REDACTED].

The taxpayer asserts that it "knew" that the method change issue, which in [REDACTED] was about to be settled with Appeals for a prior cycle, would result in significant carryover adjustments in the [REDACTED]-[REDACTED] tax years. In support, [REDACTED] has

supplied Appeals with a work sheet, dated [REDACTED] and initialed by [REDACTED], in which the taxpayer prepared a "rough" calculation of the anticipated adjustments of approximately \$[REDACTED] to the [REDACTED] and [REDACTED] years' returns resulting from the agreed method change. [REDACTED] suggests that the "rough" calculation, coupled with the necessary section 446 adjustments which it thought would be associated with the method change issue (but which apparently never materialized), justified its position that tax would be owed on the [REDACTED] and [REDACTED] returns, even considering the large NOL reflected on the [REDACTED] return.

In response to an earlier inquiry from Mr. O'Connor and based upon the foregoing facts, this office issued a May, 1999 memorandum (copy attached) which concluded that the deposit should be considered a payment in the nature of a cash bond, not an advance payment of tax. As we understand the current facts, some portion or all of the cash bond was returned to the taxpayer following the resolution of the [REDACTED] - [REDACTED] cycle by Appeals. Through its informal claim, the taxpayer now seeks to receive interest from the Service for the period of time the Service held that portion of the deposit which ultimately was returned to the taxpayer.

ANALYSIS:

The Service's position regarding the categorization and treatment of taxpayer remittances is set forth in Rev. Proc. 84-58, 1984-2 C.B. 501. As discussed in our earlier memorandum, we believe that an analysis of the instant facts under the standards set forth in the revenue procedure results in the conclusion that the deposit in question should be treated as a payment in the nature of a cash bond.

As applies to the instant issue, section 4.02(1) of the revenue procedure instructs that deposits in the nature of cash bonds are "not subject to a claim for credit or refund as an overpayment." Similarly, in discussing deposits in the nature of cash bonds, section 4.04(1), states:

Such a deposit is not subject to a claim for credit or refund and the excess of the deposit over the liability ultimately determined to be due will not bear interest under section 6611 of the Code.

The question posed here is what is the appropriate method for responding to a claim for refund or credit filed with regard to a remittance which is in the nature of a cash bond?

The above quotations from the revenue procedure are not jurisdictional in nature. The rule that a deposit in the nature of a cash bond is not subject to a claim for credit or refund as an overpayment does not obviate a taxpayer's right to claim such a refund or credit. The revenue procedure only sets forth the Service's legal position regarding claims. Such legal position, although readily accepted by the courts, comes into play only after a court of competent jurisdiction determines that the remittance in question was, in fact, a deposit in the nature of a cash bond and not an advance payment of tax. That is, a taxpayer has the almost unlimited right to claim an overpayment. In an instance such as ours, the issue which may be brought before the court will be whether the remittance in question amounts to a deposit in the nature of a cash bond or an advance payment of tax. Depending on the court's resolution of that issue, the court may also address whether it lacks jurisdiction over the claim for refund or whether the claim occurred before the expiration of the statute of limitations.

In the instant case, an apparently valid claim has been submitted by the taxpayer. To the extent that the Service considers that claim untimely, improper or otherwise invalid, the denial of the claim may be made by the Service. Such denial should include clear language that at least one reason for the denial is that the remittance in question was in the nature of a cash bond for which interest may not be claimed. Following the denial of the claim (or six months after the submission of the claim), a court may be called upon to make the factual determination of whether the remittance in question was, in fact, a payment in the nature of a cash bond as determined by the Service, or an advance payment of tax as claimed by the taxpayer.

The foregoing claim resolution methodology can be seen in the many cases where courts have been asked to determine the nature of a remittance for purposes of either determining whether the statute of limitations had expired or determining whether the court possessed jurisdiction over the dispute. See, e.g., *Rosenman v. United States*, 323 U.S. 658, 661-662 (1945); *Ameel v. United States*, 426 F.2d 1270 (6th Cir. 1979); *Thomas v. Mercantile National Bank*, 204 F.2d 943 (5th Cir. 1953); *Johnson v. Commissioner*, T.C. Memo. 1993-562.

Our conclusion is further supported by the lack of a single case or National Office pronouncement which negatively comments on the use of a Form 1364. Moreover, it is our opinion that denying a taxpayer's claim for refund or credit cannot be equated with an admission that the claim may have had merit. This is especially true where the grounds relied upon for the denial include the Service's determination that the deposit for which

refund is claimed was a deposit in the nature of a cash bond which may not be the subject of claim for credit or refund.

Mr. O'Connor was concerned that simply acknowledging the matter as a "claim" could be prejudicial since the term "claim" itself is referred to in section 6611 as a request for a credit or refund of an overpayment of tax. Mr. O'Connor felt that even addressing the matter as a "claim" may be an admission that the underlying matter constituted an overpayment of tax.

We discern no real hazard associated with acknowledging and denying such a claim. While a "claim" for refund must seek the overpayment of tax, the affirmative act of denying a claim, at least in this instance, does not imply that the underlying deposit was an overpayment of tax. To the contrary, under the facts at hand, the Service's denial of the claim is an affirmative statement that the remittance was NOT an overpayment of tax because, at a minimum, the remittance did not constitute an advance payment of tax but was, instead, a payment in the nature of a cash bond. In short, there was no overpayment of tax since there was no payment of tax. Nevertheless, whether there existed an overpayment of tax is a highly factual matter which may be disputed in court. In our opinion, the affirmative act of denying a claim does not imply that the underlying deposit was an overpayment of tax where the reason for the Service's disallowance of the claim is the Service's factual determination that the deposit for which refund is claimed was a deposit in the nature of a cash bond which may not be the subject of claim for credit or refund. Generally, see *Ameel v. United States*, 426 F.2d 1270 (6th Cir. 1970).

We hope the foregoing fully responds to the questions you raised, but if additional questions remain, please contact the undersigned at extension 3211.

MATTHEW J. FRITZ
Assistant District Counsel

By: _____

JAMES E. KAGY
Special Litigation
Assistant

Attachment:
As stated.